No. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,

PETITIONER,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, RETAIL LITIGATION CENTER, INC., AND THE NATIONAL FEDERATION OF INDEPENDENT SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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August 14, 2015

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in cases of national concern in the federal and state courts throughout the country. They support the petitioner in this case because they have a strong interest in ensuring that the lower courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The organizations joining this brief include:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of

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[1] Pursuant to Sup. Ct. R. 37.2(a), all parties have filed blanket consent letters with the clerk of court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively generate over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

Retail Litigation Center, Inc. ("RLC"). The RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC has filed *amicus*

briefs on behalf of the retail industry in several of the Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center). The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center is the nation's leading small business association, representing approximately 350,000 members across the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has emphasized on multiple occasions the rigorous analysis that is required before a trial court may certify a class under Rule 23 of the Federal Rules of Civil Procedure, including most recently in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Those precedents have direct bearing on the questions presented here. As this Court has repeatedly held, the procedural device of a class action cannot be used to adjudicate claims on a class-wide basis when class members are not similarly situated and individual issues predominate over common ones.

Unfortunately, certain lower courts in a growing number of cases have refused to comply with this Court's directions and continue to certify classes in cases that are not suitable for class treatment. This is one of those cases. In the proceedings below, the Eighth Circuit upheld the trial court's decision to certify a class of petitioner's employees seeking compensation for alleged unpaid overtime, even though the evidence suggests that more than half the members of the class did not work unpaid overtime and therefore suffered no injury. The Eighth Circuit also concluded that Rule 23 allows class liability to be adjudicated using a statistical sampling model that glossed over significant differences between class members by presuming that all class members worked the same amount of unpaid overtime as an "average" employee. With respect to both issues, the Eighth Circuit relied on the same types of arguments

and committed the same types of fallacies that this Court's decisions have squarely rejected. The lower court's certification decision violates this Court's precedents, is inconsistent with core constitutional principles, and ignores basic requirements of Rule 23. It should be reversed.

ARGUMENT

The district court failed to conduct the rigorous analysis that Rule 23 mandates and allowed the named plaintiffs to sue on behalf of a large number of uninjured class members. The district court then compounded its error by relying on improper statistical sampling evidence that eliminated petitioner's individualized defenses. These errors violated Rule 23's essential requirements, as well as the constitutional standing and due process principles against which Rule 23 should be construed.

I. The Class Action Device Cannot Be Used To Create Article III Standing.

1. The separation-of-powers principles that divide the federal government's authority between the legislative, executive, and judicial branches are deeply woven into the fabric of our Constitution. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992). One expression of those basic principles is the doctrine of standing. That doctrine is essential to "setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III," and to ensuring that any party seeking relief has a personal, particularized injury that a federal court has the power to redress. *Id.* at 560 (internal

quotation marks omitted); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Standing is built on a single basic idea—the idea of separation of powers."). As this Court has held, "[t]hose who do not possess [Article] III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982).

It is well established that part of the "irreducible constitutional minimum of standing" required under Article III is an "injury-in-fact—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61. It is equally well established that standing "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

The courts below dispensed with these essential constitutional requirements by allowing the named plaintiffs to sue on behalf of a class that includes a significant number of uninjured individuals. The courts concluded that as long as one member of the class has a plausible claim of injury, standing requirements are satisfied. *See* Pet. App. 8a–10a, 29a–30a. That approach to class certification—which would exercise judicial power to grant a "remedy" to a plaintiff with no injury—cannot be reconciled with the constraints of Article III.

2. Rule 23 does not—and cannot—eliminate the constitutional requirement that each and every litigant seeking relief from an Article III court must suffer a cognizable injury. Although Congress has the power to "expand standing to the full extent permitted" by Article III, *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979), it does *not* have the power to expand standing *beyond* Article III's limits. The "requirement of injury in fact is a hard floor that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). It is thus "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Gladstone*, 441 U.S. at 100 ("In no event may Congress abrogate the [Article] III minima: A plaintiff must always have suffered 'a distinct and palpable injury '") (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). And it follows *a fortiori* that standing requirements cannot be altered by a Rule of Civil Procedure.

Accordingly, as this Court has recognized, "Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997); *see also Ortiz v. Fibreboard*, 527 U.S. 815, 831 (1989) (same); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23's "procedural protections" are "grounded in due process"). Indeed, it is a cardinal principle of statutory interpretation that "where an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The need to avoid "serious constitutional problems" is doubly strong where a Rule of Civil Procedure is at issue. And where Congress does seek to push constitutional boundaries, it should be expected to express its intent clearly and unmistakably. *See* Br. for Retail Litigation Center, Inc. Supporting Petitioner, at 7–14, *Spokeo v. Robins*, No. 13-1339 (U.S. July 9, 2015); Br. of Chamber of Commerce of the United States of America, et. al. in Support of Petitioner, at 27, *Spokeo v. Robins*, No. 13-1339 (U.S. July 9, 2015). Fortunately, avoiding these problems is easy in the circumstances of this case. Prohibiting the certification of classes that include uninjured class members is not merely a fair reading of Rule 23, it is the only permissible one.

3. Exercising judicial power to adjudicate the claims of uninjured class members is antithetical to Rule 23's express terms. Under Rule 23(a), the named plaintiffs in any case must establish that the class claims present at least one "common question[]" that, if adjudicated on a class-wide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Moreover, Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614, imposes additional "procedural safeguards," including the requirement that courts take a "close look" to ensure that common

issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432. That "demanding" requirement, works in tandem with the general commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623–24.

The requisite cohesion exists when all class members "possess the same interest and *suffer the same injury*." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added) (internal quotation marks omitted); *see also Wal-Mart*, 131 S. Ct. at 2551 ("[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The need to prove predominance by establishing a common, class-wide injury protects both defendants and class members by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21; *see also Comcast*, 133 S. Ct. at 1434 (plaintiff must offer "a theory of liability that is capable of classwide proof"). Moreover, because class members must suffer the same injury, it follows that for a class to be certified, each member also must satisfy the minimum requirements of Article III standing—that is, each class member must have suffered an injury in fact that is traceable to a defendant and likely to be redressed by a favorable decision. *See, e.g., Amchem*, 521 U.S. at 612–13. The named plaintiffs and absent class members cannot have suffered the "same" injury, as this Court's precedents dictate, if some class members suffered no injury at all.

For similar reasons, if significant numbers of class members are uninjured, the class cannot satisfy Rule 23's typicality requirement, which serves as a "guidepost[] for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 156; *Amchem*, 521 U.S. at 626 n.20 (noting that the due process adequacy-of-representation requirement tends to merge with the typicality and commonality requirements of Rule 23). When some class members have suffered no injury, there is a fundamental disconnect between their claims and the claims of the named plaintiffs. Under those circumstances, the class members' disparate liability claims are not sufficiently "interrelated" to meet Rule 23's typicality requirement.

4. The lower courts in this case failed to enforce Rule 23's essential requirements on the view that a more lenient approach to constitutional standing is justified in the class action context. But that view reverses this Court's teachings: "In an era of frequent litigation [and] class actions courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Aggregating claims of uninjured class members is inequitable because it prejudices the interests of class members who may have suffered actual injury, and also prejudices defendants' rights by expanding the class size and increasing pressures to settle.

In this case, for example, plaintiffs' expert acknowledged that there were 212 members of the

class who suffered no injury because they did not work any unpaid overtime even under the assumed calculated averages. *See* Pet. Br. 13. Moreover, as Judge Beam explained in his dissent, the jury awarded plaintiffs less than half the damages they requested, indicating that the jury discounted the average time spent donning, doffing, and washing protective equipment calculated by plaintiffs' experts, and that even more class members may have suffered no discernible harm. *See* Pet. App. 125a. Accordingly, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.* Allowing classes to be formed where more than half of the class members potentially suffered no injury-in-fact undoubtedly opens the door to abuse.

II. Statistical Averaging Cannot Be Used To Support Class Actions At The Expense Of Individualized Inquiries.

The lower courts also erred in certifying the class notwithstanding significant differences between the individual class members, finding that the differences were rendered immaterial under plaintiffs' statistical averaging approach. That type of statistical modeling, which arbitrarily assigns an average value to each class member, is contrary to basic principles of class action law as well as the due process principles against which Rule 23 should be interpreted.

1. Allowing a class to be formed where individualized liability issues substantially outweigh common questions runs directly counter to both *Comcast* and *Wal-Mart*. In *Comcast*, this Court

clarified that a plaintiff's damages evidence cannot operate to sweep away individualized defenses that a defendant may have to individual class members' claims. Aggregate damages models that determine the average impact to the average class member are therefore impermissible. Those types of models violate the Rules Enabling Act because they transform Rule 23's "procedural device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007); *see also* 28 U.S.C. § 2072.

Wal-Mart similarly emphasized that liability and damages determinations cannot be derived from formulaic statistical techniques that gloss over key factual elements and come at the expense of individualized proceedings. Rejecting a "Trial by Formula," this Court reversed class certification where "[a] sample set of the class members would be selected," and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561.

The statistical averaging approach endorsed by the lower courts here commits precisely the errors that *Comcast* and *Wal-Mart* warned against, replacing essential individual inquiries with a single computation reflecting the claims of a hypothetical "average" class member. That approach contravenes

this Court's direction that all class members must "possess the same interest and suffer the same injury." *E. Tex. Motor*, 431 U.S. at 403. In this case, for instance, the only way to determine whether an individual class member has a viable claim (or suffered any injury) is to separately determine whether the class member actually worked unpaid overtime. Among other things, that requires an individualized accounting of each employee's protective equipment and the time spent donning, doffing, and washing gear rather than a combined average assessment spanning over three thousand employees.

2. The record shows that there are substantial differences in the protective gear that employees wear based on their job responsibilities and their own individual choices. *See* Pet. Br. 4–5, 8–14, 30–31, 34. These differences lead to large variances in the amount of time that each employee spends donning, doffing, and washing equipment. *See, e.g.*, Pet. Br. 30–31 (noting that pre-shift donning of equipment in the locker room ranged from 0.583 minutes to 13.283 minutes, and that the post-shift range was 1.783 minutes to 9.267 minutes). There are also other material differences between employees. For example, some employees don their equipment on the production line, when they are already on the clock. *See* Pet. Br. 12. Some employees with setup or teardown responsibilities don or doff their equipment as part of activities for which they are already compensated. *See* Pet. Br. 10, 31. And some employees are not required to wash their equipment, which is instead washed by the plant. *See* Pet. Br. 31. These are all critical factual issues necessary to

assess the merits of each employee's claim for overtime compensation, yet the statistical averaging embraced by the decisions below swept them aside entirely.

The Eighth Circuit acknowledged that "individual plaintiffs varied in their donning and doffing routines," and that applying the statistical averaging approach to "individual overtime claims did require inference," but stated that such an inference was "allowable" under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Pet. App. 8a. That is wrong. *Anderson* did not hold that an inference as to liability may be drawn from a calculated average that has no direct correlation to the time spent working unpaid overtime by any individual employee. To the contrary, *Anderson* made clear that an employee seeking compensation for unpaid overtime carries his evidentiary burden only by proving that "he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

The Eighth Circuit's decision failed to require any proof of the first prong of this analysis; namely, whether each of the individual class members performed work for which they did not receive proper compensation. Simply assuming that individuals performed uncompensated work on the basis of a statistical averaging model—rather than assessing the actual amount of donning, doffing, and washing time spent by each employee and how much, if any, of this time was uncompensated—is an

impermissible "Trial by Formula." *Wal-Mart*, 131 S. Ct. at 2561; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

The Eighth Circuit also tried to distinguish *Wal-Mart* on the grounds that individual "employee time records [were used] to establish individual damages." Pet. App. 10a. But the mere fact that the court conducted an individualized inquiry as to *part* of the analysis does not cure the deficiencies with its threshold determination of class-wide liability based on a formulaic statistical calculation. Plaintiffs' statistical averaging produced an estimate for additional time that ignored the substantial differences in donning, doffing, and washing activities of individual employees and denied petitioner the ability to litigate "defenses to individual claims" at trial. *Wal-Mart*, 131 S. Ct. at 2561. Adding an incorrect, unfounded amount of additional time to individual timesheets does not correct that error.

3. As this case confirms, statistical analysis for purposes of litigation is an exercise fraught with peril, as it is often susceptible to manipulation and error. *See, e.g., Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (affirming denial of certification of class-wide discrimination claim where "statistical analyses were analytically flawed because they did not incorporate key relevant variables"); *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 939 (Cal. 2014) ("If statistical methods are ultimately incompatible

with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties."). These concerns are particularly acute in connection with class action claims.

Trying to determine an "average" that fairly and accurately represents the mean across an entire class can be an extraordinarily difficult task. Yet named plaintiffs in almost every class action case will not hesitate to proffer testimony from some expert representing that the claims of absent class members can be fairly adjudicated through the use of statistical averaging. Moreover, when statistical averaging serves as the foundation for class certification, it fundamentally modifies the nature of litigation. Allowing classes on the basis of statistical averaging makes certification (and liability) determinations rest primarily, if not, solely on the basis of expert testimony rather than the factual elements necessary to support a claim. This threatens to transform litigation into a dispute over statistical modeling rather than the facts and the law. Defendants in class actions will be limited to challenging the underlying methodology used by the experts rather than litigating the factual circumstances of each claim.

All of these concerns are illustrated by this case. The statistical average that plaintiffs' expert used was calculated based on the donning, doffing, and washing times of individual employees, but because individual inputs were inflated, the calculated average was also skewed. As acknowledged by

plaintiff's expert at trial, his methodology for measuring donning, doffing, and washing time included time that employees spent putting their gear on after they had already arrived at their work stations and were on the clock. Tr. 1003. The study also counted all "personal time," with the exception of going to the restroom, spent by employees that was interspersed with their donning, doffing, and washing activities. Tr. 1046. Among other things, this meant that numerous instances of employees taking a break from putting their gear on and socializing with one another were counted as recordable time, *see, e.g.*, Tr. 1083, 1086, 1102–03, as well as time that employees spent dancing as part of their pre-work routine, Tr. 1117. The inclusion of such activities demonstrates the ease with which statistical averages can be skewed and the risk that trial by formula class actions will necessarily require extensive litigation over the validity of statistical models.

4. In addition to ignoring this Court's Rule 23 precedents, allowing a statistical model to establish liability for an entire class runs a grave risk of violating due process. At a minimum, due process requires giving a defendant a meaningful opportunity to be heard and to present every available defense, including the defense that a particular plaintiff was, in fact, not injured. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). As a *theoretical* matter a court might allow a class action to proceed based on a statistical model that elides substantial variation among the class, but then allow the defendant the opportunity to show that

individual class members do not fit within the model. But as a *practical* matter, such an approach is entirely unworkable, especially in the context of large class actions. Holding hundreds or thousands of mini-trials regarding individualized issues would frustrate the entire purpose of certifying a class action—namely, to decide identical claims simultaneously and efficiently by deciding the claims of a *representative* plaintiff. Accordingly, the use of statistical models that ignore substantial variation within a class would, as a practical matter, deny defendants their right to defend against class members' different claims. That, in turn, would raise grave due process problems.

The California Supreme Court explained these important due process concerns in a case that in all relevant respects is virtually indistinguishable from this one. In *Duran v. U.S. Bank National Association*, the trial court attempted to adjudicate overtime claims of 260 bank employees by "extrapolat[ing] the average amount of overtime reported by [a 21-person] sample group to the class as a whole." 325 P.3d at 920, 935. The California Supreme Court unanimously rejected that approach as "profoundly flawed" because it "prevented [the defendant] from showing that some class members were exempt and entitled to no recovery." *Id.* at 920. As the Court explained, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.' *id.* at 935 (quoting *Wal-Mart*, 131 S. Ct. at 2561), and "[t]hese principles derive from both class action rules and principles of due process.' *id.* Just as in *Duran*, the lower courts' interpretation of Rule

23 here would raise serious due process concerns, which provide yet another reason to reject it.

III. Failing To Enforce Class Action Requirements Harms Businesses And Absent Class Members.

The issues in this case would not have been difficult to resolve if the Eighth Circuit had complied with this Court's earlier decisions. Those decisions were intended to ensure that the class action procedural device is used only in circumstances where common issues of fact and law among class members make it feasible and appropriate to have a single, unified litigation that preserves the fundamental rights and interests of all parties. Far too often, however, the lower courts continue to certify classes that fail to satisfy Rule 23, ignoring constitutional concerns and treating Rule 23 as a convenient expedient for dispensing rough justice.

All too often, sweeping, poorly formed 'class actions benefit only enterprising lawyers and their experts. Certifying loosely connected classes is not only unfair to class-action defendants, it risks binding absent class members to class-wide dispositions that are substantially divorced from the merits of their individual claims. Those interests are particularly acute in cases, such as this one, involving a concocted average class member that, by definition, will fail to adequately represent the claims of many class members and potentially dilute the recoveries of the truly injured.

In addition, by easing Rule 23's certification requirements, the lower court's approach will often

effectively predetermine a case's ultimate outcome. It is no secret that the path to recovery in many class actions is paved by convincing trial courts to prevent defendants from litigating individualized defenses, combined with the settlement pressures brought to bear by even small possibilities of large, aggregate liability. Class actions are thus a "powerful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act); *see also id.* (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling").

It is hard to overstate the toll that frivolous class actions take on U.S. businesses and ultimately their customers. Class actions can often drag on for years. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). And the costs of defending against them continue to rise, ranging at latest estimates from "$5 million to $100 million." Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* (FINPRO Focus July 2011), available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf; *see also* Carlton Fields Jorden Burt, LLP, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://

classactionsurvey.com/pdf/2015-class-action-survey.pdf ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case.").

Although the costs are high enough to hit the bottom line of even the largest company, meritless and overreaching class actions hit small business particularly hard "because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); *see also* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010), available at http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business tort liability costs); NFIB, *National Small Business Survey* vol. 5, issue 2 (2005) (noting that, on average, the cost of settling any legal dispute (let alone class actions) consumes 10% of a small business owner's salary); Matthew Grimsley, *What Effect Will* Wal-Mart *v.* Dukes *Have on Small Businesses*, 8 Ohio St. Entrepreneurial Bus. L.J. 99, 116–117 (2013) (discussing how small businesses, with fewer resources, are particularly ill-equipped to fight frivolous class actions). And, in addition to the direct costs of time and expense, there is the not-insignificant indirect cost to a business's reputation that comes with being embroiled in a class action. *See, e.g.*, Grimsley, 8 Ohio St. Entrepreneurial Bus. L.J. at 100 & n.7.

Given these factors, it is not surprising that, as this Court has repeatedly recognized, "[c]ertification of a large class may so increase [defendants'] potential damages liability and litigation costs that [they] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." 131 S. Ct. at 1752. In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

Class actions will probably always "present opportunities for abuse." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is particularly great in cases, like this one, where plaintiffs are allowed to inflate the class size by including individuals in the class who suffered no harm and rely on a flawed statistical averaging approach that brushes aside significant differences among class members.

* * *

The outcome in this case should not be in doubt: The Eighth Circuit's decision approving class certification should be reversed. The critical question is whether this Court will attempt to address the broader failure of certain lower courts to comply with Rule 23 and this Court's precedents. Because class action abuse remains a serious problem, *amici* respectfully ask the Court to take this opportunity to set out in clear terms the bright-line rules that should apply in this important area of the law. *First*, Rule 23 does not and cannot eviscerate constitutional standing requirements and, therefore, no class should be certified if it includes uninjured members. *Second*, statistical sampling must be applied with special care in the class action context and should never be used to resolve liability issues where there are significant differences between class members. *Third*, basic due process principles prohibit a class action from being structured such that a defendant may be held liable to an individual plaintiff without ever having an opportunity to present defenses specific to that plaintiff.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 14, 2015